IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

**J U D G M E N T**

SURAJ MAL V. THE STATE OF RAJASTHAN

D. B. CRIMINAL APPEAL NO. 303/1983

Under Section 374 (2), Cr.P.C.,against the Judgment dated 02.08.1983 , passed by the learned Sessions Judge, Bikaner, in Sessions Case No.81/81.

DATE OF JUDGMENT :::: SEPTEMBER 05, 2007

**PRESENT**

**HON'BLE MR. JUSTICE BHAGWATI PRASAD**

**HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI**

Mr. P.N.Mohnani ) for Appellant (s).
Mr. M.K. Garg )
Mr. J.P.S.Choudhary, Public Prosecutor.

**BY THE COURT: (PER HON'BLE BHANDARI, J.):-**

Aggrieved by the judgment dated 02.08.2003, passed by the Additional Sessions Judge, Bikaner, in Sessions Case

No.81/81, this appeal has been preferred by the appellant – Suraj Mal.

Accused – Surajmal made a report in Police Station, Ganga Sahar, District – Bikaner on 01.03.1979, at about 7.30 a.m. In the said report, it was stated that he is serving in State Bank of Bikaner & Jaipur, Hospital Road Branch, Bikaner on the post of Clerk-cum-Cashier. On 28.02.1979, when he returned back to village Udasar, at about 8.30 p.m., then found his wife – Radha missing. On enquiry from parents, it was informed that Radha has gone with the child , who had a call of nature but, thereafter, said Radha did not return. After waiting for some time, when his wife Radha did not return, then, on search, Radha was found in a water tank, in front of his residence. When she was taken out from the tank, found dead. Therefore, report was made to the Police. It was further reported that since the incident took place at village Udasar, from where he reached Police Station, Gangashahar on foot, therefore, it caused delay in filing of FIR.

Shri Jaimal Singh, Station House Officer (SHO), Police Station, Gangashahar prepared report of sudden death (Ex.P-5), Panchnama (Ex.P-7) and site-plan (Ex.P-6). It was reported that water tank was having only 3 ft deep water which was found to be dirty water of rain. The clothes of deceased were found to be clean and not soiled. The SHO Jaimal Singh nominated 'Panchas' to find out the cause of death, but no satisfactory answer was

given by him, even though Suraj Mal - complainant accused was also member of Board of 'Panchas".

Deceased Radha's father – Kumaram subsequently made application to the Deputy Superintendent of Police (Dy. S.P.) , North, Bikaner on 04.03.1979, in which he had shown doubt about the murder of his daughter Radha Bai by Suraj Mal, his mother and sister. He made a request that the case should be registered against them. It was further prayed that the local Police is not itnent to lodge challan, therefore, Police investigation should be conducted by the C.I.D.

The case was, thereafter, registered and investigation was conducted by the C.I.D. Who, later on, filed a challan against the accused Suraj Mal in the lower Court, from where the matter was committed to the trial Court. The Government has given prosecution sanction for initiating case against against Dr. Bal Krishna under the provisions of Section 197 of the Cr.P.C. Accordingly, case was initially challaned in the Court of Judicial Magistrate No.1, Bikaner, from where the matter was committed to the Committal Court.

The trial Court framed charge against the accused under Section 302 of IPC. Accused denied the charge and claimed trial. At the trial, thirteen witnesses were examined and forty-four documents were exhibited by the prosecution. In defence, three witnesses were examined and forty documents were exhibited.

The trial Court, thereafter, convicted accused under Section 302 of IPC and sentenced him to life imprisonment.

Learned counsel appearing for the appellant argued that it is not a case of homicidal death, yet appellant was convicted under Section 302 of IPC. It was urged that as per the post-mortem report, mode and cause of death remained unknown. Thus, in those circumstances, the learned trial Court was not justified in convicting appellant under Section 302 of IPC. Learned counsel further urged that even the prosecution could not prove its case by leading evidence so as to connect accused with the crime. It was submitted that it being a case of circumstantial evidence, the prosecution was required to show chain of circumstances to prove guilt of accused. According to the learned counsel, circumstantial evidence available on record, was not proving the chain of circumstances, yet the learned trial Court has taken note of motive of the accused and convicted him under Section 302 of IPC. It was lastly urged that the entire judgment of the learned trial Court is mainly based on conjectures and surmises, whereas no case against the accused can be held to be proved on the basis of such inferences, therefore, it was prayed that the judgment of the trial Court may be set aside.

Per contra, learned Public Prosecutor submitted that though the complaint was filed by the accused, but the same

was nothing but an intention to cover his crime and this fact was taken into consideration by the trial Court where prosecution case was found to be proved. It was urged that not only there exists circumstantial evidence against the accused connecting him with the crime, but there exists even motive with the accused to commit offence under Section 302 of IPC. It was argued that the accused was ordered to pay a lump sum amount of Rs.10,000/- in a case which was settled between him and deceased wife and it is for that reason, the accused committed crime. According to the learned Public Prosecutor, the learned trial Court has not committed any illegality in convicting the accused under Section 302 of IPC. Thus, it was prayed that the judgment of the trial Court may not be interfered with.

We have gone through the record and carefully examined the matter.

The present case was started with the submission of report by accused Suraj Mal before the Police Station, Gangashahar, Bikaner, at about 7.30 a.m. on 01.03.1979. The accused Suraj Mal stated that when he returned back to his home at 8.30 p.m. On 28.02.1979, found his wife missing. On inquiry, it was found that she had gone with the kid to get him relieve from natural call. After waiting for some time, when his wife – Radha did not return, then he made a search for her. During the course of search, his wife was found in a water tank, near his residence

and when the Radha was taken out from the tank, she was found to be dead. He started from village Udasar on his foot to make a report to the Police at Bikaner and for that reason, caused delay in submission of the report. On the submission of report, the SHO Jaimal Singh visited site and taking note of the circumstances, got suspicious about the death of deceased Radha, more specifically when no satisfactory reply was given by the Panchas, so nominated by him. The case was further beign reported through an application by Umaram who is father of deceased Radha. Umaram stated that he could know about the death of his daughter on 02.03.1979 when it was found that not only his daughter died on 28.02.1979, but was further being cremated, without any information to him. He received information only by Poonam Chand – Constable.

Umaram (P.W.9) stated that Radha was his daughter and after marriage of deceased Radha with accused Suraj Mal, he was receiving complaints of harassment. It was found that accused and his family members used to beat Radha and, at one point of time, deceased Radha was kicked out from their house. Around 8 days back, accused Surajmal had given a letter to Hanuman and the gist of said hand written letter (Ex.P-27) was that some day accused may kill his daughter Radha. In the year, 1972, Radha filed a suit for divorce against accused Suraj Mal, in which direction was given by the Court to pay a sum of

Rs.67/- per month for maintenance and Rs.50/- towards cost of litigation which was not paid by the accused. The said divorce case was ultimately decided against the deceased Radha thus appeal was filed before the High Court, where the matter was settled between the parties vide Ex.P31. As per the settlement, Suraj Mal was to pay a sum of Rs.10,000/- to deceased Radha, out of Insurance Policy but amount was not paid resulting in attachment proceedings. Almost fifteen days before the death, when he met Radha, she made a complaint that she is feeling weakness. When inquired about the condition of deceased Radha from accused then witness was threatened by Surajmal with dire consequences. On 02.03.1979, he got information of death of deceased Radha died due to drowning, then he got suspicious as the tank was having only 2 ft. deep water, therefore, it was felt to be a case of murder. In the cross-examination, witness admitted that he had not earlier stated that he visited the village Udasar along with the Police and even seen the water tank. In exaplanation, it was submitted that the said fact was not disclosed, because it was never being asked. It was further admitted that Chothu Ram informed him about the death of deceased Radha and when he visited Police Station on 2nd March, 1997, then he could know that Surajmal had already made a report in the Police Station, he could know that the tank was having 3 ft. deep water and at that stage, he could trust

that his daughter Radha must have been killed by accused Suraj Mal and his mother and sister. The said witness had made statement against the accused Suraj Mal, based on inferences.

PW 8 Dr. S.K. Pathak (P.W.5) stated that he was a Member of the Medical Board which had conducted second post-mortem examination of deceased Radha. The witness stated that after recovering the record, the Board was of the opinion that no definite opinion can be given regarding the cause of death, for the following reasons :-

"1. The postmortem report shows that all the organs which are examined were healthy, except for lungs which were congested and oedematour and fine froath exuded from the cut surface on pressure. Stained fine froath was present in the larynx and trachea which were otherwise healthy. The above mentioned findings are not specific for any cause of death and in absence of any other positive findings is was not possible to state the cause of death in this case.

2. According to the chemical examination report, the organs examined were negative for the common poisons.

3. Histological report shows conjection and oedima of lungs. No other description is available on record."

The witness further stated that external injuries found on the body could not have been due to drowning. The witness also stated that after careful examination of original post-mortem report, the only positive findings were regarding presence of

fine froth at the nostrits. Congestion of trachea and larynx which contained fine stained froth. Congestion of lung which on pressure executed fine froth. Lastly, presence of abrasions on the right and left side of jaw, right cheek below the eye, right elbow on the back and right breast. However, even after taking note of above findings, it was not possible to ascertain any specific cause of death. Perusal of post-mortem report (Ex.P-3) also shows that after examination of the body, the Board could not form any opinion regarding mode and cause of death of the deceased. It was further stated that due to decomposition of body, histopathological examination is not expected to reveal anything authentically.

Jaimal Singh (P.W.3) stated that he was In-charge, Police Station, Ganga Shahar, at the relevant time. He had prepared report (Ex.P-5) and based on that report, he visited site, where the dead body was lying. Clothes on the dead body were found to be dry and not soiled. He had, thereafter, visited water tank and taken measurement. Water tank was found to be 8 ft. deep, out of which water was found lying upto 6 ft. of the tank. It was explained that out of 6 ft. water level, 3 ft. was mud in the tank and the remaining 3 ft. was the water. He immediately got suspicious, because despite of existence of mud in the water tank, the body was found to be clean and not soiled, therefore, he registered the case under Section 302 of IPC. In the cross-

examination, witness admitted that in examination-in-chief, he had stated the fact regarding suspicion of death, but in support of the same, he could not find any evidence. For measurement of tank, he had used cloth inch tap and without entering into the water tank, measurement was recorded. It was further admitted that he had not taken sample of water and the tank was inspected by him along with Suraj Mal. The said witness stated that he had seen the dead body which was not having any injury on the face as well as on hands. Lastly, said witness admitted that despite of suspicion of the death of deceased, no fruitful investigation could be conducted so as to reach to the logical conclusions of murder.

On perusal of the judgment of the learned trial Court, it revealed that the Court was cautious about the fact that it is a case of circumstantial evidence, and the prosecution was required to prove chain of circumstances to connect accused with crime. However, judgment shows that the trial Court emphasized more on the motive of the accused to connect him with the crime. The learned trial Court proceeded with the fact that it is the accused who was in know of the cause of death and as he has not disclosed the fact, is to be held guilty. The Court has focused on the fact that no body can commit suicide in a water tank, having only 3 ft. deep water. However, if at all, it is considered that deceased Radha died due to drowning in a tank,

having mud in its bottom, it should have sticked to her clothes, but clothes of deceased Radha were found to be clean. Another fact taken note of by the trial Court that there was no reason for Investigating Officer Jaimal Singh to make a statement against the deceased as he was not having any rivalry with him. The Court came to the conclusion that accused Suraj Mal made report to save himself, thus cooked a story to hide real fact of cause of death and as accused Suraj Mal is suppressing real fact thus, according to the learned trial Court, he has to be held guilty for the crime.

The learned trial Court has further taken note of the fact that deceased Radha was away from his house from 5.30 p.m. Itself, but Surajmal's parents did not make any inquiry and when accused Suraj Mal returned to his residence at 8.30 p.m., then also, he changed his clothes and went to parents' residence without explaining the fact that when his wife herself was residing with his parent's, then where was the occasion to come to his residence first.

The learned trial Court has, however, considered the fact that there is a contradiction in the medical evidence. While referring to the medical report, it was seen that the injuries sustained by deceased Radha could not have been caused due to drowning and prosecution failed to explain as to how injuries were caused to the deceased and the same was not explained

by the accused Surajmal. Dr.Balkrishna, in his explanatory statement, submitted that all those injuries were caused, after death. The learned trial Court recorded its finding that there was inordinate delay in making report to the Police by the accused Surajmal and that delay shows that during the intervening period, Suraj Mal could get advise to explain the delay. Thus relying on these facts, the learned trial Court came to the conclusion that Suraj Mal, knowing about the fact of death, kept silence deliberately.

According to trial Court, certain letters show that husband - wife as well as husband and father-in-law were not having good relations. Even the matter went to the Court for that reason, where wife filed a suit for divorce which ultimately was settled by the High Court, with a direction to the accused to pay a sum of Rs.10,000/-. The accused ultimately faced attachment proceedings, thus he was annoyed with Radha.

The conclusions drawn by the Court below do not show that there is chain of circumstances to connect accused with the crime. It seems that the learned trial Court failed to consider that aspect of the matter though in the case of circumstantial evidence, the case cannot be held to be proved, only on the basis of motive, unless accused can be connected with the crime, after taking note of chain of circumstances. In fact, guilt cannot be held to be proved, on the basis of suspicion.

When a case rests upon circumstantial evidence, evidence must satisfy at least following three tests :

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

(ii) Those circumstances should be of a definite tendency unerringly pointing out towards the guilt of the accused.

(iii) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probabilities, the crime was committed by the accused and none else. The circumstantial evidence, in order to sustain conviction, must be complete and inescapable of explanation of any other hypothesis than that of a guilt of the accused and the circumstantial evidence should not be consistent with the guilt of the accused and should be inconsistent with his innocence.

Taking note of above cardinal principles, as referred to above, if this case is examined, then we find that the trial Court has failed to take note of basic principle to prove a case of guilt based on circumstantial evidence. The learned trial Court mainly relied on the fact that it is accused Suraj Mal who was knowing about the cause of death and as he has not given any satisfactory explanation, he has to be held guilty. The other facts discussed by the trial Court are mainly regarding motive of the

accused to commit a crime, but the learned trial Court failed to show chain of circumstances to connect accused with the crime.

If post mortem report, conducted by the Board itself, is taken note of, then it becomes clear that the Board could not give opinion regarding mode and cause of death of the deceased, though in the earlier report, Dr. Balkrishna had given the cause of death due to drowning, but against said Dr.Balkrishna, prosecution was initiated, for that reason alone. Ignoring the post-mortem report, the learned trial Court recorded its finding without taking note of the fact as to whether it can be said to be a case of homicidal. If it is not proved to be a case of homicidal death, question of crime under Section 302 of IPC does not arise. It seems that the learned trial Court was impressed with the fact that in the year, 1972, some divorce matter was initiated by deceased which ultimately resulted into settlement in the High Court, with the direction for payment of Rs.10,000/- by the accused giving him a cause. While taking note of this fact, the trial Court failed to consider that if such event happened long back, then, can it be said that the accused was having motive or cause to commit a crime under Section 302 of IPC after many years.

The learned trial Court has not taken note of the fact that in absence of opinion regarding mode and cause of death, how the conclusion of case of homicidal be recorded.

Referring to the statement of Jaimal Singh (P.W.3), it becomes clear that in the cross-examination, the witness has admitted that though he was suspicious about the cause of death of deceased Radha, but he could not get evidence to connect accused with the crime. The said witness admitted that no fruitful result could came in the investigation to prove that deceased Radha died due to violence. Witness Jaimal Singh was the Investigating Officer to whom accused Suraj Mal made a report about the death of Radha and said witness visited the site at the first instance, but during inspection also, he had not taken proper care to collect material or to take proper measurement. The level of water, flooded with mud and water, cannot be measured by a cloth inch tap, more specifically when witness had admitted that he did not enter in the tank. After marshaling the complete evidence available on record, we could not find it to be a case where there exists chain of circumstances to connect accused with the crime, rather if the post-mortem report of the Medical Board is looked into, then even mode and cause of death is not coming out so as to treat it to be a case of homicidal.

In a case Manjunath Chennabassapa Madalli v.State of Karnataka (JT 2007 (3) SC 550), decided by the Apex Court, following principles were laid down for ascertaining the case of circumstantial evidence. The Hon'ble Supreme Court held thus -

"**8.** We may also make a reference to a decision of this Court in **C.Chenga Reddy and Others v. State of Andhra Pradesh (JT 1996 (6) SC 397),** wherein it has been observed thus :

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence...."

**9.** In **Padala Veera Reddy v. State of A.P. and Others (JT 1989 (4) SC 223),** it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests :

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken

cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

**10.** In **State of U.P. v. Ashok Kumar Srivastava (JT 1992 (1) SC 340),** it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

**11.** Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the

burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted"

**12.** There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the Court as far back as in 1952.

**13.** In **Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh (1952 SCR 1091),** wherein it was observed thus :

> "It is well remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the

> circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

**14.** A reference may be made to a later decision in **Sharad Birdhichand Sarda v. State of Maharashtra (1985 (1) SCR 88).** Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are :

> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;
>
> (2) the facts so established should be consistent only with the hypothesis of

> the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (3) the circumstances should be of a conclusive nature and tendency;
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> (4) they should exclude every possibility hypothesis except the one to be proved; and
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> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability he act must have been done by the accused."

In the light of the judgment referred to above also, we find it difficult to accept the finding of the learned trial Court as the same is largely based on surmises & conjunctures. In our opinion, the cardinal principle laid down by the Hon'ble Apex Court though taken note off by the trial Court but same was not applied while recording finding of guilt against accused. The perusal of entire judgment of the trial Court shows that same is largely based on suspicion against the accused. Thus, finding of the trial Court based on such suspicion cannot be maintained. The learned trial Court laid much emphasis on the fact that

accused was in know of the cause of death of deceased Radha and for the reason that same was not explained, thus, according to the learned trial Court, accused is to be held guilty. While recording such finding, the trial Court failed to consider that accused was on duty on the day of occurrence serving in a Bank at Bikaner and he returned to village Udasar at about 8.30 p.m. If medical evidence taken note of, then it becomes clear that it does not corroborate prosecution case so as to involve accused in the present matter, more so, when it is not even proved to be a case of homicidal death. The trial Court was required to look into all these aspects, more so, when it was a case of circumstantial evidence. If medical evidence shows that mode and cause of death is not known, then it cannot be ignored casually. However, as the learned trial Court has shown its concern on suspicion for connecting accused with the crime, we cannot endorse the finding of the trial Court. It may be that there was suspicion against the accused, but suspicion cannot take the place of proof. The evidence on record fall short of proving the guilt of the accused beyond reasonable doubt, hence accused is entitled for the benefit of doubt. Thus, the judgment of the learned trial Court cannot be sustained, hence the same is set aside. Accordingly, the conviction and sentence of accused under Section 302 of IPC is set aside. Since the accused is on bail pursuant to the order of this Court dated 16.09.1983, hence

his bail bonds are ordered to be cancelled.

In view of the above, this appeal is allowed and the judgment of the learned trial Court is set aside.

**(MUNISHWARNATH BHANDARI),J.(BHAGWATI PRASAD),J**

scd.